

**U.S. Department of Labor**

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**Issue date: 25Oct2001**

CASE NO.: 2001-LHC-01414

In the Matter of

**JOHN DAJNAK,**  
Claimant,

v.

**HOLT CARGO SYSTEMS, INC,**  
Employer,

and

**RELIANCE INSURANCE CO.,**  
Carrier,

and

**DIRECTOR, OFFICE OF WORKERS'  
COMPENSATION PROGRAMS**  
Party-in-Interest

Appearances:

David Linker, Esquire  
For Claimant

John Kawczynski, Esquire  
For Employer/Carrier

Before: **PAUL H. TEITLER**  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding involves a claim for disability compensation filed by John Dajnak, Claimant, pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (the Act).

A formal hearing was held in Camden, New Jersey on June 21, 2001, at which time all parties were afforded full opportunity to present evidence and arguments as provided in the Act and applicable regulations. Joint Exhibit 1 was admitted into the record. The Parties submitted Exhibits marked (JX 01-28). The Claimant submitted the Deposition of Mark Allen, M.D., marked CX 01, and the Employer submitted the Deposition of Gad G. Guttmann, M.D., marked as EX 01.

### **STIPULATIONS**

At the commencement of the hearing on June 21, 2001, the parties entered into the following Stipulation:

1. The parties are subject to the provisions of the Act;
2. Claimant was injured on March 6, 2000 at the Packer Avenue Marine Terminal in Philadelphia, Pennsylvania;
3. The parties agree that an employment relationship existed at the time of injury;
4. The parties agree that claimant's injury arose within the course of his employment;
5. The parties agree that employer received timely notice of claimant's injury and that employer timely notified USDOL of claimant's injury;
6. The parties agree that the Notice of Controversion (LS-207) was filed on September 8, 2000;
7. The parties agree that claimant was paid temporary total disability from March 7, 2000 to September 4, 2000 for a period of 26 weeks of compensation at the rate of 390.01 per week for a total payment of \$10,140.26;
8. The claimant's average weekly wage is \$585.00/week.

## **ISSUES**

Per the joint stipulation of the parties (JX 1), the following issue was presented for resolution:

1. The nature and extent of Claimant's disability.

## **STATEMENT OF THE CASE<sup>1</sup>**

The Claimant, John Dajnak was employed as a mechanic for Holt Cargo Systems, and he sustained an accident on March 6, 2000. He sustained an injury to his lower back while lifting a heavy object. He was taken to the emergency room and then treated at an industrial clinic. He ultimately came under the care of an orthopedic surgeon, Dr. Mark Allen. Mr. Dajnak received total temporary disability from the date of the accident to September 4, 2000. He attempted to return to work on or about September 12, 2000, working approximately eight days. After eight days, Mr. Dajnak said he was unable to continue working due to the pain he was experiencing in his back. The Claimant is seeking continuing temporary total Disability Benefits based upon his testimony and the testimony of Dr. Allen. The Employer is seeking to terminate benefits based in part on the testimony of Dr. Guttmann.

## **TESTIMONY OF JOHN DAJNAK**

Mr. Dajnak testified that he was born on February 4, 1952, and was a High School graduate who had not been in military service. He started employment with Holt Cargo Systems ("Holt") in July of 1998. TX 08. His general job title was maintenance, and he was hired as a mechanic. He worked at Pier 98 south, off of Packer Avenue in Philadelphia, Pennsylvania. His employment at Holt required him to repair chases and containers, change brakes, perform break jobs, weld, repair lights, and straighten bent frames. Break jobs required the most physical work because of the crouching when moving approximately 700 pounds with a hydraulic jack. Claimant would remove both wheels while either bending over with two hands on the wheels and one foot against the chassis, or using a long pipe to pry the wheel loose.

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<sup>1</sup>The following references will be used herein: "CX" designates Claimant's exhibit; "JX" designates Joint Exhibits; "EX" designates Employer's exhibits; "TX" designates pages from the transcript of the hearing held before me on June 21, 2001; "TD" designates pages from the medical depositions of Dr. Guttmann and Dr. Allen.

Mr. Dajnak denied any prior accidents or prior back injuries. TX 09-10. He believed that the accident in question happened at approximately 10:00 a.m. Claimant was cutting cross members from a frame and ran out of oxygen. He had to undue the oxygen bottle which is about five feet tall weighing about 125 pounds and roll the bottle to the tailgate of a pickup truck. He then leaned it against the tailgate and bent over to lift the bottle into the back of the truck. He then felt intense pain in his lower back, but tried to continue for about another thirty minutes. TX 11,12. Claimant's foreman, known only as "Pat T.", heard him yell and came over to him. Claimant rested for about one half hour. Someone else retrieved a full bottle of oxygen for the Claimant. Claimant could not continue to bend down because of pain in his back. He went to his supervisor and insisted that he go to St. Agnes Industrial Care at the hospital. TX 13. He was given prescriptions for Ibuprofen, and later returned to the hospital where he was referred to Penn Support Physical Therapy. He exercised there three times a week. TX 14. The therapy did not help because his movement was very limited and caused great pain; it usually hurt him to drive to and from therapy. He received treatment at St. Francis until a doctor suggested that he attend therapy five times per week. He did not think that he could attend more than three times a week so he decided to make a change. TX 15.

On April 6, 2000, Claimant began treating with Dr. Mark Allen. At that time, he complained of back and leg pain. Dr. Allen suggested additional testing. TX 16. Claimant underwent additional therapy at Oxford Rehabilitation. This therapy consisted of being hooked up to heat and electrodes while running through a series of exercises. Claimant felt that this treatment provided some improvement. As such, Claimant decided that he would try to return to work around September 12<sup>th</sup>, 2000. At that time, he believed he was not fully recovered, but still in an improved condition. He said prior to returning to work he had a functional capacity test and was told not to lift anything heavier than 20 pounds. TX 17,18. The first four or five days at work were easy; he was repairing lights and filling out FHA certificates. After the first five days, he was asked to do heavier work, including changing landing gears. Each gear weighs 200 pounds or better, and has to be lifted in a position to be bolted and welded. He could not complete this job. TX 19.

He testified that since September, 2000, he has been unable to return to work at Holt. He said that a friend owns an auto repair shop a short distance (150-200 feet) from his home and he spends a good part of his day "hanging out" there. While at the body shop, he puts on the coffee and answers the phone. He claims that he does not work there, or anywhere else. TX 20. He also claims that he has not been receiving any worker's compensation benefits. TX 21. The body shop owner is John Coglein and Claimant has a social relationship with him. TX 23.

### **CROSS-EXAMINATION**

Claimant was told that a video tape showed him unlocking the door of the body shop. He said that he had the keys to the shop and that he occasionally opened the shop

for the day. Doing this required operating the pulley chain which opened the roll door. He also occasionally took out the trash. He said that he may have rolled a trash can on wheels to the curb. He also runs errands for him, taking a car and dropping it off somewhere. Mr. Coglin arrives within 15-30 minutes after him and two or three times a week, Claimant arrives first. He denied that he would write up customers, but admitted he might take the keys if they were leaving the car. He said he would probably not be able to help someone pick up a car. He previously worked at several motorcycle shops. TX 24-25. He said he might sometimes have a suggestion for a car repair. He said that he was familiar with crash books, and could estimate repair costs. TX 26. The shop is an automobile repair shop and has estimating guides for repairs. Claimant testified that, on occasion, Mr. Coglin borrowed money from him. TX 28.

### **RE-DIRECT**

Claimant testified that he has keys to the body shop and Mr. Coglin has his house keys. Claimant further testified that, "[the body shop] has an alarm system. He's had problems with [it] and I'm on the list for people to call when his alarm goes off at the shop. He lives approximately a block way, on a side street. I think I actually live closer to the shop than he does, so if he would be away and they couldn't reach him, they'd call me." TX 29.

### **DEPOSITION TESTIMONY MARK ALLEN, M.D.**

Dr. Allen testified that his three page curriculum vitae was correct. CX 01. He is licensed to practice medicine in Pennsylvania. He is currently affiliated with St. Joseph's Hospital, was the Chief of the Department of Orthopedic Surgery at Neumann Medical Center until 1995 and is currently the Chairman of the Department of Orthopedic Surgery at St. Joseph's Hospital. He testified that he is Board eligible but has not successfully completed the written portion of the Boards after having sat for them three times. TD 8-9.

Dr. Allen first met with Claimant on April 6, 2000. TD 10. Mr. Dajnak gave a history of pain in the lower back, due to an injury on March 6, 2000 while at work as an automobile mechanic. He claimed that while lifting a 175 pound oxygen bottle, he experienced immediate pain in his lower back. He was taken to the emergency room at St. Agnes Hospital where negative X-rays were taken of the lumbar spine. He came under the care of a Dr. Bonner (phonetic), who initiated a course of physical therapy. TD 12.

At this time, Mr. Dajnak was experiencing constant lower back pain radiating into the left lower extremity, which increased by prolonged sitting, standing, bending reaching, pulling and sudden movements. Dr. Allen conducted an orthopedic examination. TD 12. Forward bending produced symptoms; standing after sitting caused pain. The lumbar spine examination was positive for paravertebral muscle spasm. This objective finding is the result of resistance to the reversal of the lordotic curve, in turn causing pain. TD 13-15. Flexion was limited and performed cautiously to 50 degrees and hyperextension performed

to 10 degrees. Overall, the range of motion was 50 percent of normal. TD 15. Straight leg raising was positive to 40 degrees on the left. TD 16. The neurological exam found the reflexes symmetric; there was no sensory deficit. Right hip flexors were somewhat weak, indicating some type of nerve root involvement on that side. His diagnosis was lumbosacral sprain and strain with left lumbar radiculopathy. TD 17. The Doctor referred him to Dr. Mark Cohen to continue therapy. Due to his continuing pain, on June 5, 2000, CAT scan was done of the lumbar spine which demonstrated at levels L4-5 and L5-S1 there was a disk bulge without evidence of herniation. But there was evidence of L5-S1 exit foraminal impingement. TD 17.

Claimant continued conservative treatment and therapy under Dr. Cohen. Dr. Allen noted from his September 21, 2000 evaluation that he returned to work on September 12, 2000. TD 18. Dr. Allen also noted that on September 12<sup>th</sup>, 2000, while lifting 125 pounds he experienced an exacerbation of immediate pain in his lower back. Claimant stated his pain increased with prolonged sitting or standing and with bending and lifting. His range of motion was limited to 50 percent of normal. There was no focal muscle weakness. Dr. Allen's impression was lumbosacral sprain and strain right lumbar radiculopathy. TD 19. Dr. Allen started him on Motrin and took him out of work.

Since September of 2000, Mr. Dajnak was continually re-evaluated by Dr. Allen. TD 20. Dr. Allen stated that he had continued to evaluate his patient in October and November; Mr. Dajnak attempted to do a therapy program but his symptoms persisted. In December, Dr. Allen suggested a vertebral axial decompression procedure. TD 20. Presently, he is being treated conservatively and is not in therapy. His last examination was on May 24, 2001. The diagnosis is "unresolved lumbosacral strain with radiculopathy and evidence of L4-5 and L5-S1 bulged disc." TD 21.

Prior to his deposition, the doctor reviewed the reports of Dr. Guttman and five minutes of surveillance tape. Dr. Allen stated that within a reasonable degree of certainty there was relationship between the incident of March 6, 2000 and his reticular lower back pain. TD 23. The patient's history and physical findings were consistent, and there was no evidence of another cause of his problems. TD 22,23. The doctor said that he was familiar with mechanic's work. His opinion was that from April 6, 2000 there was an overall improvement to the extent where he was returned to normal duties. Since his exacerbation of September 21, 2000, he has not been able to return to work. TD 24. Dr. Allen believes this is because his ongoing symptoms have not resolved. TD 24. Mr. Dajnak's present residual functional capacity limits him to the extent to which he can lift, bend, twist and otherwise perform some of his daily living activity. The Doctor suggested functional capacity testing. TD 25.

## **CROSS-EXAMINATION**

Dr. Allen stated that viewing the surveillance video did not change his opinion. Dr. Allen addressed two areas of question: where he was raising and lowering the metal roll-up door in front of his friend's auto body repair shop and where he raised and moved a trash container to the curb. TD 26. Dr. Allen said that he had a roll-up door in one of his prior offices which was cumbersome and that he was impressed how easily Mr. Dajnak was able to maneuver the roll-up door. Dr. Allen noted that he did not have to change his body mechanism beyond the use of his arms. The movement took no body weight or had no body effect. Dr. Allen stated that unless his arms are tremendously strong, he was impressed how easily the door worked. TD 27-28.

Relative to the moving of the trash can, it was Dr. Allen's opinion that Mr. Dajnak would not be able to do that on a consistent basis. The trash was not significantly heavy and without much effort, Mr. Dajnak was able to lift it over a three foot fence and put it out on the street. He did not appear to have clinically significant changes in his back. TD 27, 28, 29. The doctor admitted that some of the degenerative changes more than likely predated the injury of March 6, 2000. What makes degenerative changes clinically significant is the arc of movement and how much movement has to occur across the degenerative joint. Dr. Guttmann agreed that the patient sustained a lumbosacral strain and sprain. When someone strains their back there's heightened ability at that level, and that is why degenerative changes that were not clinically significant before the injury become clinically significant as a result of the injury. Pressure on the discs increases the progression of degenerative changes. Thus, Dr. Allen believes the pressure of the discs becomes clinically significant now. TD 30, 31, 32. The doctor stated that at the present time, Mr. Dajnak is unable to do the type of work he was performing prior to the injury. Relative to sedentary work, there is still one additional hurdle. The question would be whether or not he can give a consistent five-day, eight hour a day work week.

## **DEPOSITION TESTIMONY OF GAD G. GUTTMANN, M. D.**

Dr. Guttmann is Board Certified by the American Board of Orthopedic Surgery, and is currently an Associate Professor of Orthopedic Surgery at Jefferson University. He is an active orthopedic surgeon at Albert Einstein Medical Center, Department of Orthopedic Surgery. TD 06.

Dr. Guttmann examined Mr. Dajnak on July 10, 2000, and October 23, 2000. On his July, 2000 examination, he observed that Mr. Dajnak ambulated in a normal, reciprocal gait, had no difficulty removing his clothing, standing on each leg separately, removing his trousers, socks and shoes. Mr. Dajnak was able to climb and decline from the examining table. In a sitting position, he had normal knee and ankle reflexes, good strong toe extensors, no atrophy of the thigh or calf musculature. TD 07. He had very strong quads against resistance, no abnormal sensation to sharp and dull discrimination as well as

vibratory and cotton swab discrimination which were equal in both lower extremities. Palpation of the lumbar spine showed no spasm and no point tenderness or tapping of the spinous processes and no tenderness over the sciatic notch and sciatic trunk. Straight leg raising was 80 degrees bilaterally with hamstring tightness but negative Lasegue. In the standing position, his bending was limited to his fingertips about 3 inches shy of the ground. Hyperextension and bending from side to side was normal. He had no pain over the greater trochanter and had normal range of motion of the hip, knee and ankle joints; he denied any bowel or bladder problems. TD 08.

Dr. Guttmann stated that he had X-rays of the Claimant as well as a CAT scan of the lumbar spine. The CAT scan showed multilevel central canal space narrowing especially at the levels of L4-5, L5-S1, with disc bulging. There was no evidence of a disc herniation but there was slight impingement of the intervertebral foramen at the level of L4-5; at L5-S1 there was disk space narrowing. TD 09. The X-rays were taken on the date of injury and they show arthritic changes between L-5-S1 at the apophyseal joints. The lordosis appeared to be normal, which speaks against spasm. All the vertebral bodies, sacroiliac joints, and hip joints were also normal. TD 09. There was a shadow of the iliopsoas that could be appreciated on both side of the lumbar spine. At the sacroiliac joints on the L5-S1 on both sides, there was narrowing and sclerotic changes of the disk space. He had a history of the accident and all the treatment that Mr. Dajnak received. He summarized Dr. Allen's initial report as showing normal posture with a normal cervical examination; sitting and bending activities caused back pain. TD 11. His neurological examination was normal regarding reflexes and sensation. Dr. Guttmann found Dr. Allen's examination as revealing acute lumbosacral sprain and strain with left lumbar radiculopathy. TD 12.

Dr. Guttmann summarized an evaluation done by Mark Cohen, a chiropractor. He indicated that Mr. Dajnak could not meet work demands that required high lift, mid lift and low lift, he could not carry 50 pounds. He recommended Mr. Dajnak be placed on part-time light duty, maximum lifting of 20 pounds, and no activities below the level of his waist for a period of two weeks with a plan to return to his full time position with these limitations. TD 12.

Dr. Guttmann stated that he examined Mr. Dajnak four months after the accident and, from a purely orthopedic and neurological standpoint, the examination was normal. Mr. Dajnak has subjective complaints relative to his soft tissue injury. He has a preexisting degenerative L5-S1 disc disease and his present strain was superimposed on an already preexisting arthritis of the spine. TD 13. He felt that this condition would improve and he should be placed on light duty with a maximum lifting of 20 to 50 pounds with an opportunity to change positions from standing, sitting and bending. He felt that the condition would resolve in six weeks.



He again evaluated Mr. Dajnak in October, 2000. TD 14. At that time Mr. Dajnak stated that he returned to work as of September 12, 2000. He worked for eight days during which time he was required to change tires, pick up landing gears and fix them in a capacity as mechanic. He stopped working on September 21, because his back flared up again after doing heavy work. Since then, he has not returned to work. He went back to Dr. Allen, who told him to take it easy and to start physical therapy. Mr. Dajnak told him that the pain was located in the same area of his back as before, which was in the left lower back. The pain was localized and nonradicular. TD 15. The pain was much less in intensity, and was localized. Mr. Dajnak told Dr. Guttmann that he was taking ibuprofen and motrin, but, on the date of examination, he did not take any medicine.

Dr. Guttmann reported that Mr. Dajnak had a previous resolved serious motorcycle accident which left him with some slight atrophy of 1 centimeter on the right side which is opposite to the present injury, and he had no pain in this area. TD 17. Dr. Guttmann's examination revealed straight leg raising on the right was 90 degrees with some hamstring tightness and a negative Lasegue. On the left, about 80 degrees with some hamstring tightness and a negative Lasegue. Dr. Guttmann opined that the difference between 80 and 90 degrees is negligible. The other ranges of motion were normal. TD 16,17. The palpation of the paralumbar area showed no true spasm. Mr. Dajnak complained of tenderness along the midsection of his lower back towards the left at the level of the L5 area.

Dr. Guttmann stated that he again reviewed the original X-rays, and questioned the mild left L5-S1 exit foraminal impingement as reported by the radiologist. Dr. Guttmann opined that the disk space between L5-S1 was narrow and sclerotic in margins, indicating preexisting degenerative disc disease at that level. TX 18. Dr. Guttmann's diagnosis was relative to the first incident that he had a sprain and strain superimposed on his degenerative disc disease. He did recover from his soft tissue injury well and then returned to work where he had a recurrence of his symptoms. On October 23, 2000, Dr. Guttmann did not find any true objective clinical findings that corroborated his subjective complaints of a recurrence of symptoms. TD 19. Dr. Guttmann also stated there were diagnostic studies that indicated there was some L5-S1 degenerative arthritis. He opined that Mr. Dajnak should be able to return to work on a light to modified duty capacity within the next two weeks and to full duty within the next six weeks. TD 20. Dr. Guttmann testified that a lot of people at the age of 48 do have some degenerative changes so that certain activities cause them a flare-up of pain. It is also common at that age to respond well to a short course of physical therapy. TD 20.

Dr. Guttmann stated he reviewed the surveillance tape (JX 26). What he saw was that Mr. Dajnak was moving in a normal fashion and doing his activities in a normal fashion. TD 21,22.

Dr. Guttman was then asked to comment on the pain drawings that he requested Mr. Dajnak make. Mr. Dajnak did not indicate that his knees had pain, so Dr. Guttman concluded that he did not have radiculopathy. Further, Dr. Guttman's examination did not indicate radiculopathy, as the patient did not complain of any pain in this area. TD 23,24.

### **CROSS-EXAMINATION**

Dr. Guttman said that Mr. Dajnak was not magnifying symptoms. TD 26. He reviewed the surveillance video for about 20 minutes. Based on Mr. Dajnak's statements of pain, Dr. Guttman did not believe that he was magnifying symptoms. Even though he found no corroborating evidence of the pain, he assumed the patient's statements to be true and placed the initial weight restrictions on Mr. Dajnak. He was restricted for a period of time to not lift more than 20 pounds by himself. Dr. Guttman's plan was to progressively scale back the restrictions over time. TD 28.

He stated that a mechanic type job or any type of activity could cause a flare-up. He testified that people with back situations learn how to modify and avoid certain things. They should do back exercises to tone up the muscles. He put Mr. Dajnak on these exercises. He admitted the more strenuous the activity the greater the risk that someone will have a temporary flare-up. TD 28, 29.

### **DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW**

In arriving at a decision in this matter, the Administrative Law Judge is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459 (1968) *reh'g. den.* 391 U.S. 929 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153 (1985).

The person seeking benefits under the Longshore Act has the burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 312 U.S. 267 (1994). Such burden of persuasion obliges the person claiming benefits to persuade the trier of fact of the truth of a proposition. This burden is not met where the person claiming benefits simply comes forward with evidence to support a claim.

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); *United States Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor*, 455 U.S. 608, 102 S.Ct. 1312 (1982), *rev'g Riley v. United States Industries/Federal Sheet Metal, Inc.*, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an

injury pursuant to §2(2) of the Act. *Gardner v. Bath Iron Works Corporation*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385 (1<sup>st</sup> Cir. 1981); *Preziosi v. Controlled Industries*, 22 BRBS 468 (1989); *Janusiewicz v. Sun Shipbuilding and Dry Dock Company*, 22 BRBS 376 (1989); (Decision and Order on Remand); *Johnson v. Ingalls Shipbuilding*, 22 BRBS 160 (1989); *Madrid v. Coast Marine Construction*, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5<sup>th</sup> Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9<sup>th</sup> Cir. 1966); *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986); *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986). Also, when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5<sup>th</sup> Cir. 1983); *Mijangos, supra*; *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Care v. WMATA*, 21 BRBS 248 (1988).

Total disability is defined as complete incapacity to earn pre-injury wages in the same work as at the time of injury or in any other employment. To establish a *prima facie* case of total disability, Claimant must show that he cannot return to his regular or usual employment due to his work-related injury. If Claimant meets this burden, Employer must establish the existence of realistically available job opportunities within the geographical area where Claimant resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. *Mills v. Marine Repair Service*, 21 BRBS 115, 117 (1988); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976), *aff'g.* 2 BRBS 178 (1975); *McCabe v. Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, n.7 and related text (3d Cir. 1979).

The Employer, in their brief, concedes that the Claimant sustained an injury on March 6, 2000, in the course and scope of his employment, that rendered him disabled until September 4, 2000. Employer's position is that by September 4, 2000, Claimant fully recovered and was able to return to work without restrictions. The Claimant testified that he felt better than how he had been feeling prior to that date and decided to return to work on September 12, 2000. TX 18. Claimant's further testimony revealed that the first four or five days were "real easy". TX 18. He repaired lights and filled out FHA certificates. However, after those five days, he got into heavier work, including changing landing gears. This task required removing the damaged landing gear, proceeding sideways, lifting the 200 pound

landing gear into position, bolting it onto braces and welding the braces. TX 19. Mr. Dajnak testified that on September 21, 2000 he got as far as halfway through the job and could not continue any further. TX 19. He was experiencing back pain. He returned to Dr. Allen and they decided to do home exercises. TX 20.

In his cross-examination, Dr. Guttmann stated that Mr. Dajnak was not magnifying symptoms. TD 26. Dr. Guttmann diagnosed, relative to his first accident, a sprain and strain superimposed on Mr. Dajnak's degenerative disc disease at the level of L4-5, L5-S1. TD 19. Dr. Allen opined that there was an exacerbation of his previous injury on September 21, 2000. On October 23, 2000, Dr. Guttmann indicated that at that time, although there was degenerative arthritis at L5-S1, he felt that Mr. Dajnak should be able to return to his work on a light to modified duty capacity within the next two weeks and to full duty within the next six weeks. TD 20. From Mr. Dajnak's creditable testimony, I conclude that he sustained an exacerbation of his back condition due to the heavy lifting he was required to perform at Holt. Dr. Guttmann supported his claim that he had an exacerbation of his back injury, and suggested that, as of October 23, 2000, he should return to two weeks of light duty and then to full duty.

I credit Dr. Guttmann's testimony, in light of his examination and diagnosis of the Claimant, over Dr. Allen's examination and diagnosis. Dr. Guttmann is Board Certified in Orthopedic Surgery, while Dr. Allen has no board certifications. I also find that Dr. Allen's testimony, stating that Mr. Dajnak is and has been unable to return to work since the September 21, 2000 exacerbation of his back pain, is not creditable. In his testimony, he states at TD 24,25:

Q. Do you have an opinion as to [Claimant's] residual functional capacity at this point?

A. His residual functional capacity, bottom line, limits him to the extent to which he can lift, bend, twist and – including some of his activities of daily living. And specifically – quantitate?

Q. Well, if you can. If you feel you can give such an opinion with reasonable professional certainty. If you can't, then don't guess.

A. Yes. I would – I would, again, just state that those activities mentioned are significantly limited, but there are more objective studies that can – can more better quantitate the extent.

Videotape Surveillance, seen by both Doctors prior to their testimony and marked as JX 26, shows Mr. Dajnak's abilities to "lift, bend, twist" have not been entirely compromised in light of his injury. In fact, I view the surveillance and see Claimant performing his daily

activities on both October 31, 2000 and January 30, 2001 with relative ease. Testimony fails to reveal and the weight of the evidence does not support Dr. Allen's belief that Claimant's September 21, 2001 exacerbation limits his daily activities and prevents him from further employment.

Clearly, Dr. Allen did not provide meaningful comment relative to the surveillance films. TD 22. Dr. Guttmann reviewed the video and stated that Claimant's activities on the dates in June, August, October, 2000 and January 2001 demonstrated normal activities. He could not detect a neurological deficit that correlated to the injury. TD 21. The Claimant was moving in a normal fashion and performing all of his activities in a normal fashion.

Further, Mr. Dajnak's testimony clearly indicated that he was performing employee type services. He was opening his friend's repair business at least 2-3 times per week. Claimant's testimony is not creditable that he would not assist a customer. He admitted that he might have a suggestion relative to a diagnostic auto problem. He was familiar with repair estimation, knew where the labor estimating guides were kept and how to use them. He occasionally even delivered a car. While he claimed that he was performing these services out of friendship and without monetary compensation, the services were obviously comparable to work related activity that would allow Mr. Dajnak to be paid.

Mr. Dajnak stated that, "I don't believe I'm able to perform the job anymore creditable." TX 22. I do not find Mr. Dajnak's statement that he could not return to work at Holt credible. I credit Dr. Guttmann's October 23, 2000 diagnosis:

By history, Mr. Dajnak had a sprain and strain superimposed on his pre-existing degenerative disc disease at the levels of L4-5, L5-S1... And in my opinion I felt that [Claimant] should be able to return to his work on a light-to-modified duty capacity within the next two weeks and then to full duties within the next six weeks. TD 19.

I credit Dr. Guttmann's medical opinion, as well as the surveillance video, as demonstrating that Mr. Dajnak had the residual functional capacity to perform work related activities. Accordingly, I find that Mr. Dajnak had the residual capacity for light work as of November 6<sup>th</sup>, 2000, which was available at Holt Cargo Systems, and that he could be allowed to continue with light work for the next six weeks.

An employer found liable for the payment of compensation is, pursuant to §7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 22 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). Entitlement

to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Company*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to §7(b), is well settled. *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978). A claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his or her work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978).

In *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under §7(b) does not negate the requirement under §7(b) that a claimant obtain the employer's authorization prior to obtaining medical services. *Banks v. Bath Iron Works Corp.*, 22 BRBS 301, 307, 308 (1989); *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983); *Beynum v. Washington Metropolitan Area Transit Authority*, 14 BRBS 956 (1982). Therefore, the Employer is responsible to Claimant for all reasonable, appropriate and necessary medical care occurring between September 22, 2000 and November 6, 2000, subject to the provisions of §7 of the Act.

## ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Employer shall pay:

a) pay Claimant appropriate compensation, commencing on September 22, 2000, and continuing to November 6, 2000 for his back injury, based upon his average weekly wage of \$585.00, compensation rate of \$390.01.

b) furnish Claimant with such reasonable, appropriate and necessary medical care during that period of time, subject to the provisions of §7 of the Act.

2. Employer shall pay Claimant interest on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

3. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon.

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**PAUL H. TEITLER**  
**Administrative Law Judge**

Cherry Hill, New Jersey